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IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1934.

## No. 69.

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

*Appellant,*

*vs.*

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

*Appellee.*

## PETITION FOR REHEARING.

H. D. RUMMEL,
DONALD O. BLAGG,
A. G. STONE,
*Counsel for Appellee.*

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

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**No. 69.**

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FRED L. FOX, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia,

Appellant,

vs.

STANDARD OIL COMPANY OF NEW JERSEY, a corporation created under the laws of the State of Delaware,

Appellee.

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## PETITION FOR REHEARING.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the Standard Oil Company of New Jersey, the appellee in the above-entitled cause, by its counsel, and respectfully presents this petition for a rehearing of

the first and second points discussed in the opinion handed down in said cause on January 14, 1935, and states the following reasons in support thereof:

I.

Your petitioner respectfully says that the Court has grounded its determination, that there has been no denial of the equal protection of the laws guaranteed by the Fourteenth Amendment, upon principles which are erroneous as applied to a classified plan of taxation; and that an application of the principles, which your petitioner believes to be correct, necessarily will result in an affirmance of the decree of the district court.

The underlying principle upon which the Court determines that equal protection has not been denied is stated in the opinion substantially as follows:

> All "stores", including filling stations, which are in the same class on the basis of numbers, are subjected to an "equal rule"; therefore, the disparity in the actual burdens, to which such members are subjected, is not evidence of arbitrary discrimination.

Petitioner respectfully asserts that this proposition is an erroneous statement of the principles by which this case must be controlled.

**A. The conclusion of the Court that the tax is not arbitrarily discriminatory is predicated upon the proposition that where the power to tax exists, the extent of the burden is exclusively a matter for the legislature. The application of this principle in effect excludes the constitutional guaranty of the equal protection of the laws from this case.**

The Court determines that petitioner is not denied the equal protection of the laws on the ground that where the power to tax exists, the extent of the burden of the tax is for the legislature alone. Thus, the Court translates the familiar principle that the *amount* of a tax is a matter of legislative discretion into the proposition that the extent and distribution of the burdens in a classified system of taxation are immune from judicial restraint under the equal protection clause of the Constitution. This method of determining the law of the case is tantamount to stating that once the power to tax on a given theory is sanctioned, the legislature may do what it will, and that the results which flow from the practical operation of the tax do not present a proper subject for judicial inquiry under the equal protection clause.

Petitioner at no time has denied the power of the legislature to fix the amount of a tax. It recognizes the principle of the *Magnano* case, and would concede its applicability to the privilege of filling station operation, the selling of oleomargarine, or to any other taxable privilege. That is not this case. The present tax is a graduated tax upon a legislative classification, predicated solely upon the taxable attributes of the several groups

in the classification. It is not a tax upon subjects selected according to differences in kind. Such a classification involves the relationship of taxpayers, one to the other, and the validity of the classification depends upon whether the legislature has given due regard to that relationship. In this particular the legislature is subject to the definite constitutional limitation of equal protection, and a classification which results in gross discrimination cannot be justified on the theory that the extent of the taxing power rests with the legislature.

**The classification effected by the present statute applies the same tax formula to taxpayers who are not similarly situated in fact. This is arbitrary discrimination.**

This Court has repeatedly held that "classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159. There is ample authority that similarity of situation involves comparison of taxable values or attributes, and the facts of this case show that the taxable values or attributes of the filling station chains do not warrant the discriminatory burdens imposed upon them. On the basis of the relation of numbers of units to taxable attributes, filling station chains and general commodity chains are strikingly dissimilar.

Discrimination may be effected in two ways. It may result from the application of a different rule to persons similarly situated, or it may result from the enforcement of the same rule against persons who are not similarly situated. In either case the wrong done is the same.

The district court found, and this Court agrees, that the tax casts a burden upon the petitioner and other filling stations operators much heavier, "both absolutely and relatively to earnings, than any that is borne by others." This Court has pointed out that in 1932 the average gross revenue at the 101 company owned stations was $26,822 and the average for the 848 agency stations $3,892. The separation of owned from agency stations has no significance in this case. From the standpoint of the state, and for the purpose of this tax, all the 949 stations are of the same class and are taxed at the same rate. The average gross revenue for all was but $6,041, and the average net revenue but $248.37. The Court remarks that if the billing price to the stations includes a profit for refining and transportation, the business may show a gain when viewed in all its parts. The tremendous losses in the refining and transportation branches are shown in the record, but the profit or loss from the business *in all its parts* is not an issue. The tax is not on the integrated business of manufacturing and selling oil products, or any other commodity. The tax is on the privilege of operating marketing outlets, and the validity of the tax must be tested by its relation to that privilege and that privilege alone.

Recognizing the inevitable and peculiar effect upon the service station business, this Court justifies the tax with the statement that if the tax is oppressive, it is because the company has chosen to multiply its units and that its burden is attributable not to the law but to the exigencies of business. There are two answers to this. The first is that the organization of the system of stations antedated the chain store tax statute. Indeed it was enforced

retroactively to the first day of the year of its passage, and part of the money which is sought here to be recovered is the money which was paid under this retroactive aspect of the statute. The second and more fundamental answer is that if a tax violates the equal protection guaranty of the Constitution it does not lie with the state to say that it is not the law which imposes the burden, but the voluntary election of the taxpayer to engage in a business which falls within the language of the taxing statute.

The district court did not deny the principle of chain store taxation, but having determined, upon the basis of extensive findings of fact, that the practical effect of the statute "is to exact heavy taxes from a particular industry out of all proportion to the value of the privilege ejoyed" (Soper, R. 260), it concluded that the tax was so flagrantly disproportionate as between the stations and other chain organizations as to violate every conception of equal protection as defined by this Court in prior cases.

Notwithstanding that this Court finds, with the district court, that the gasoline stations inevitably must bear a burden much heavier (absolutely and relatively) than that borne by other chains, and notwithstanding the undisputed fact that these stations pay 84.46% of all taxes collected under the statute, the Court now says:

> "The classification is not arbitrary, but in normal operation has a rational relation to the subject matter to be taxed, the capacity to pay and the justice of the payment."

Had the tax been imposed in 1932, the average would have exceeded the net earnings at more than 900 of

appellee's stations. The figures for the first half of the year 1933 show that it was highly improbable that any agency station would earn the tax. Petitioner cites these figures here not to show confiscation or violation of due process, but to explain its failure to understand the statement that the tax has a rational relation to the subject matter, the capacity to pay or the justice of payment.

In every case cited by the Court the tax bore a relation to some tangible evidence of capacity to pay. With respect to the principle that the taxing policy of the state is not controlled by the profits of the taxpayers or the accidental inequalities of trade, petitioner says that it is no accidental inequality when the group of taxpayers who contribute 84% of the taxes collected are subjected to a capital levy, a burden not even remotely shared, absolutely or relatively, by others which are included in the same taxable class by the legislature.

**B. Even though it be conceded that the privilege of operating a chain of stations and the privilege of operating a single station are separately taxable, the adoption of the "store" unit as the exclusive basis for the classification and graduation is arbitrary and without relation to taxable values.**

The opinion stands on the principle that a graduation of the tax on chain organizations, based solely on the number of "stores," is not arbitrary, regardless of the extent to which the graduation is carried on that basis. The issue raised under this head is a narrow one, directed

only to the fact that the statute imposess the tax on the number of "stores" alone, without regard to gross or net earnings, or to any tangible factor by which the tax burden on different chain organizations may be even roughly equalized.

The record is replete with figures showing the gross inequality in the respective burdens as between long and short chains of filling stations, and as between commodity chains and filling station chains. This is so because the "store" unit is not a rational index of the taxable attributes of filling station chains. In order to complain one must be a member of a group unjustly discriminated against. Petitioner is such a taxpayer. It is under no duty to present a factual record showing as to other kinds of chain organization that the "store" unit is not a rational basis for graduating the tax. Petitioner is not primarily concerned with the inequalities in so far as they affect other filling station chains, but the record abundantly shows that the inequalities of which petitioner complains are present in as great or greater degree with respect to all other gasoline distributors operating 75 or more stations.

In the *Liggett* case this Court said that the county line basis for graduating the tax was so barren of relationship to the value of the privilege enjoyed by any chain that to use it was to deny the equal protection of the laws. The "store" unit, when applied to the privilege of operating filling station chains, is equally devoid of rational relationship to taxable values. It is very different, for example, from a tax based on gross income, fixing higher rates on chain establishments. Then, however high the rates (even

if in general operation confiscatory of profits in point of fact) it would be more plausible to urge that all members of the general class of chain organizations were taxed, according to a standard which takes into account, at least to some degree, the comparative capacity to pay and the comparative value of the privilege enjoyed, as reasonably indicated by the volume of business done in the state. *Cf:* Laws of Mississippi (1930) ch. 90, sec. 2-c, art. 1, imposing an additional tax equivalent to one-fourth of one per cent of the gross income of the business of persons operating more than five stores in the state, passed upon in *Penny Stores, Inc.* v. *Mitchell* (D. C. S. D. Miss. 1932) 59 F. (2d) 789, *aff'd,* 284 U. S. 576. Also *cf: Great Atlantic & Pacific Tea Co.* v. *City Spartanburg* (S. Car. 1933) 170 S. E. 273, involving a municipal ordinance classifying according to numbers of "stores" and measuring the tax on the basis of gross income. A tax based upon gross income is at least roughly related to a standard of value, albeit grave injustice may be worked in individual cases. A tax based solely upon "stores" as a unit is based upon no standard of value in filling station operation but upon a nebulous unit of measure which is entirely devoid of any tangible quality.

The practical effect of the use of such an arbitrary and meaningless basis for the graduation is demonstrated in this record by a comparison of average gross earnings, and average "store" tax per unit for various filling station operators doing business in directly competitive locations (Appellee's Original Brief, pp. 44-48, and Table No. 7), and by the stations of competing chains doing business in exactly the same manner. The substantial rates imposed by the Act result in a vastly greater

burden on long filling station chains than on those with less than 75 units, simply because the basis for measurement is the number of "stores" exclusively. Reduced to cents per gallon of motor fuels sold, the chain store tax of the appellee was equivalent in 1933 to .83 cent per gallon, while the tax on the competing chains within the highest bracket ranged from .27 cent per gallon in the case of the Pure Oil Company to 1.13 cents for the Gulf Refining Company. In contrast, representative short chains are the Atlantic Refining, American Oil, and Texas companies with "store" taxes equivalent to .001 cent, .004 cent and .002 cent per gallon, respectively. (Appellee's Original Brief, Table No. 6, column 15, p. 41.)

If the contrast be carried to the filling stations and the general commodity chains, the discrimination is even more apparent. The "store" as a unit is a mere abstraction. As a common denominator for taxing the marketing privilege it means no more than the use of the "pound" as a unit of taxing the privilege of selling all commodities, applicable alike to wheat, nails and diamonds.

In the *Liggett* case, *supra,* there was no record overthrowing the validity of the "store" unit as the exclusive common measure for the tax as between kinds of chains. The validity of acting on that ground of difference does not emerge from the mere sanction in that case of the general principle that chains may be taxed more heavily than independents. It is one thing to hold that every kind of chain has a peculiar quality, distinguishing it from independently-operated establishments in the same field and justifying a higher charge. It is quite another to hold that the "store" basis is adaptable to a general tax on all

kinds of chains when the facts in the record show the contrary.

In the present situation it is said that "all members of a class within the same graduated levels" are subjected to the same rule of taxation according to numbers of units. Because the businesses are characteristically different, the taxation of all kinds of chains, including filling station chains, according to that same rule is in practical effect taxation according to an unequal rule. There is a wide difference between the relation of numbers of units to taxable value in the filling station chains and the relation of numbers of units to taxable value in the general commodity chains.

> "* * * Substantial equality and fair equivalence are important factors in determining the presence or absence of arbitrary discrimination in such situations; * * * Mathematical equivalence is neither required or obtainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens."
>
> *Concordia Fire Insurance Company* v. *Illinois*, 292 U. S. 535, 547.

The taxation by a single rule of chains dissimilarly situated, when substantial rates are involved, results in a substantial inequality to filling station chains.

**C. An incidental motive of repressing existing chain systems is supported neither by legislative declaration, nor by proof, nor by the circumstances under which the Act was passed.**

It is not the province of the courts to speculate as to the incidental motives involved in the enactment of a tax measure.

What was the incidental motive of the legislature in the enactment of this statute? Was it actually to force an abandonment or reduction in the number of units in existing chains? Was it to discourage or suppress the further extension of these existing systems of retail distribution? Or, was it only to equalize the opportunities of doing business for independents by placing a tax on chains roughly proportioned to the greater value of the privilege enjoyed by them in West Virginia? Who can say, with certainty, as to the first two? In the absence of legislative declaration, or record proof, is it possible to assume that the motive was anything more than the usual one in revenue measures to impose charges according to taxable attributes of those subjected to the statute?

The Court has held in all prior chain store tax litigation that it cannot speculate as to the existence of an incidental motive to suppress or repress chain businesses. The theory of the decision in the *Jackson* case, 283 U. S. 527, 533, 537, 544, was to treat the Indiana statute as a revenue measure, pure and simple. The same was true of the Florida statute. *Liggett* v. *Lee,* 288

U. S. 517, 535, 536. Here, as in these prior cases, the argument that the statute was an exercise of the police power, as well as of the taxing power, with the incidental motive of suppression or repression, was but "faintly urged" by the tax commissioner. This was an issue upon which appellant offered no proof.

In the *Jackson* case, 283 U. S. 527, 537, the Court said that "it is not the function of this court in cases like the present * * * to seek for the motives * * * which prompted the adoption of the legislation." In the *Liggett* case, 288 U. S. 517, 535, the Court again said: "Assuming power to suppress by taxation a form of organization deemed inimical to the public interest, we can attribute no such motive to the present statute in the absence of legislative declaration or record proof." In the *Liggett* case it was determined that a progression on the county line basis bore no relation whatsoever to the "value of the privilege enjoyed" and was invalid. The Court now makes a clear departure from these cases and says that an inordinate tax is justified on the ground of an undeclared and unproven motive to discourage multiplication of units. Continuing its discussion of the motive behind the tax the Court says that in principle there is no distinction between this case and the *Magnano* case. If that be true, it is plain, transparently so, that the possible social and economic purposes have no place in the determination of the validity of the present tax, for in the *Magnano* case this Court said:

> "The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else."

Petitioner asserts that in principle there is a plain distinction between the *Magnano* case and the case at bar. There the legislature selected a specific subject for taxation. There was no attempt to create a class, and consequently no opportunity for unequal treatment of the members of the class.

Petitioner deduces from the language of the opinion here that the Court continues to recognize as an abstract principle that undeclared collateral motives of the legislature are beyond judicial inquiry, but it is the conviction of the petitioner that it is only upon the speculative assumption that the legislature acted out of a desire to repress chain systems as inimical to the public interest, that this Act can be said to bear any relation to its object. It is only from this viewpoint that the Court can ignore the undisputed proof, and the findings of the district court, that the classification which assimilates commodity chains and filling stations is in total disregard of the principle that the value of the privilege must be considered. And even if the assumed incidental purpose be given full weight, it lacks force in this case. Where the legislature purports to place all kinds of chains in a general class for similar repressive treatment, the basis for the graduation does not bear a "reasonable and just relation to the object" when in fact only one kind of chain is repressed and all others remain relatively untouched. Even to accomplish a regulatory purpose the Act must operate generally in the same way on all classes of chain organizations subjected thereto.

It is not the function of this Court to specify proper bases for legislative action. But it is known that there

are bases affording an "equal rule" for repressing all kinds of chains generally if that is clearly the legislative object. It is also known that an "equal rule" for the purpose of raising revenue without repression can be formulated so as to approximate roughly the value of the privilege enjoyed by all kinds of chains. Perhaps, the experience of legislatures in time will reveal other valid bases not yet tried, either for the purpose of taxation or repression. While value is not the sole basis for a revenue measure, a rational relation to value is a reasonable requirement for such a tax. *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 61, 83. And, when the incidental motive of repression is not properly shown, the legislative conception in fixing a tax based on numbers of units must have been roughly to tax according to the value of the privilege enjoyed by the various groups of taxpayers affected. *State Board of Tax Commissioners* v. *Jackson; Liggett* v. *Lee,* both *supra.* And, if the presumption attending the validity of the legislative scheme is overthrown by a factual foundation of record, the Act must fall. *O'Gorman & Young* v. *Hartford Fire Insurance Company,* 282 U. S. 251.

From the face of this Act the only legitimate assumption is an object to raise revenue. Not only that, the extrinsic circumstances surrounding its passage show that it was but one of many measures enacted in 1933 to offset losses from direct taxes on property resulting from the adoption of a tax limitation amendment to the state constitution. This was fully developed in the opinion of the district court. (Record, 256-260.) There is no basis for assuming an incidental motive to repress. When the sole object of the statute is to raise revenue by roughly

approximating the value of the privilege enjoyed by classes of taxpayers, as is the case here, persons entitled to invoke the equal protection clause of the Constitution should be able to look to this Court to invalidate a tax measure, based solely on number of units, which the record demonstrates does not bear a "reasonable and just relation" to that object. *Liggett* v. *Lee,* 288 U. S. 517, 533-5.

**D. The Court determines that a series of filling stations under single ownership has the benefit of chain operation so as to render it subject to the chain store tax, notwithstanding that it finds that single and multiple stations are parts of a common system.**

Petitioner has never denied that its system of stations may properly be termed a chain. Neither has it denied that certain of the benefits of chain store distribution are present in its operations. Nowhere in brief or argument has petitioner "picked out one feature of management after another" from the enumeraton in the *Jackson* case and denied their application to its own business. Petitioner, however, has asserted, consistently, from the filing of the bill of complaint to this time, that these advantages are not the result of the acquisition of its system of retail outlets, and that in the business of service station operation these characteristics do not distinguish the multiple stations from the single stations. As a consequence thereof it contends that a series of stations is not subject to a different measure of taxation from stations in separate ownership. This Court now says that on this point the district court held in favor of the state. Petitioner

does not understand this to be true. Judge Chesnut speaking for that court said:

> "And the somewhat elaborate stipulation of facts in the case very clearly leads to the conclusion that the combined characteristics which feature the typical chain store system and which have served as a basis for special classification for purposes of taxation do not inhere in multiple ownership or control of filling stations as compared with individual or independent ownership and operation of a single filling station." (R. 268)

This Court says that in arriving at the view that a series of stations is a different taxable species from single stations it is significant that the multiple stations fix the retail price and set "the pace". The essential justification heretofore made for the separate classification of chain stores is that they are assumed to enjoy the advantages of chain distribution *to the exclusion of single stores.* Every circumstance in the gasoline distribution business, and, as petitioner sees it, the very language of this Court, indicates that in that business the "chain" stations and the single stations are integral *parts of a common system,* all enjoying the marketing advantages of chain distribution. Whether the single stations adopt these advantages willingly, or, as the Court intimates, they are driven to adopt them, is in petitioner's view beside the point. The fact is that the company controlled stations and the single stations are in a common league, all enjoying the advantages of abundant capital, warehousing, standardized systems and advertising and other incidents of large scale distribution. Consequently, as Judge Soper pointed out, there is no evidence of economic hostility between the owners of single stations

and "the numerous gasoline and oil stations which oil companies of national scope have established and maintained in every section of the country." (R. 259)

It is for these reasons that petitioner has earnestly insisted, and urges now, that in the filling station business there is no substantial ground for taxing the single station at a nominal rate and the so-called chain station on a prohibitive basis. Petitioner does not believe the grounds for distinguishing the chain stores from single stores as laid down in the *Jackson* and *Liggett* cases are controlling as to service stations.

## II.

Your petitioner respectfully says that, in holding the filling stations and bulk distributing plants to be "stores" within the meaning of the Act, the Court disregards the body of public thought with reference to "chain stores".

There is no reasonable doubt that the statute is directed at the *kind of place* where goods, wares and merchandise are sold, and not to the character of the merchandise. It is clear that the essential aim of the statute was to place a tax burden on chain stores. To test the purpose of the statute by the literal meaning of the words of Section 8 is to lose sight of the actual and primary intention of the legislature. It must have intended to reach the same kind of establishments which people generally have in mind when thinking of chain stores. This Court now says that

gasoline and other petroleum products are goods, wares and merchandise, and that this "satisfies the test of the statute." The petitioner is substantially reinforced in its position by the fact and the finding of the district court that there is no body of public thought which associates filling stations with the chain commodity stores.

The reason for this is clear. This record shows that prior to the establishment of filling stations by the companies, gasoline was distributed by garages and repair shops. The companies were the pioneers in the filling station business and the controversy over the alleged displacement of the local merchant has had little or no application to that business. Thus the Federal Trade Commission, although directed by the Senate of the United States to investigate every phase of the chain store problem (S. R. 244, 70th Cong.) deliberately omitted filling stations from its consideration "because of the apparent intent of the inquiry." (Sen. Doc. 31, 72d Cong. 1st Sess.)

Where there is clearly no public thought to sustain the position that chain filling stations are chain stores, petitioner respectfully urges, contrary to the holding of this Court, that the popular meaning of the statutory language is entitled to very great consideration in determining the legislative intent and meaning.

And, however all this may be as to the filling stations, petitioner respectfully urges that the bulk plants are clearly beyond the reach of the statute. This Court apparently agrees that the places covered by the statute must be establishments for the selling of goods. The bulk plants, which are essentially storage depots, are brought

into the statute by this Court on the ground that they are used "in part as a source of supply from which deliveries can be made to buyers."

It seems that this determination by the Court is far from the legislative intent which was to tax places in which goods are sold. If the present language of the Court is to prevail, then every warehouse and every establishment from which goods are delivered is a "store" and taxable under the Act.

Petitioner has urged an interpretation of the language of the statute which is in accord with popular understanding and which is in harmony with the public thought regarding chain stores.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that the decree of the district court be upon further consideration affirmed.

Respectfully submitted,

H. D. RUMMEL,
DONALD O. BLAGG,
A. G. STONE,
Counsel for Appellee.

February 7, 1935.

## Certificate of Counsel.

I, H. D. RUMMEL, counsel for the above-named Standard Oil Company of New Jersey, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

H. D. RUMMEL
Counsel for Appellee.